CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT. MAY TERM, 1815.

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BLAKE & AL. vs. MORGAN.

BLAKE & AL. vs. *MORGAN, ante* 375.

Former judgment confirmed.

MATHEWS, J. delivered the opinion of the Court.* In this case, the Court having doubted the correctness of their judgment, have attentively considered the grounds of error, suggested by the counsel of the defendant and appellee, in his petition for a re-hearing; and after the most unbiassed review of the judgment, and careful examination of the facts in the cause, they can perceive no reason, in any respect, to alter their former opinion.

WE do not believe that there has been any mistake in point of fact, in considering Morgan as the

*MARTIN, J. did not join in this opinion, having been of counsel in the cause.

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shipper and owner of the sugar; that he was the shipper, there is not a shadow of doubt; and it does appear equally clear to us from the documents and evidence in the suit, that by his declarations and acts, he has made himself so far the owner, as to be liable on his contract of affreightment. In the suit instituted by him against the Fishers, praying a sequestration and restitution of the property, he explicitly declares himself the vendor, to his consignees who were the purchasers, and claims the right of having it restored to him on account of their bankruptcy: it is then certainly proper to consider him in the character which he has assumed, that of a seller stopping his goods in *transitû*, in consequence of the failure of his vendees and consignees: and in this point of view, it is wholly immaterial whether or not, he purchased the sugar, expressly for the Fishers by their order, provided it was done with his own funds or on his own credit, for in such cases, the agent is considered, in law, so far the owner and seller as to authorise him to stop the property, when the consignee becomes a bankrupt before delivery. If we are correct in this view of the facts, the error in law, attributed to the court, is at an end, as it rests solely on the ground of our having misconceived the fact.

THE objection to the judgment, made on account of not deducting the sum allowed by one of the juries, who tried the cause in the court below,

from the amount of freight due on the contract, is so fully explained and done away, in our opinion delivered on the first hearing of the suit, that we deem it unnecessary to add any thing more on that subject.

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In the petition for a re-hearing and in the course of argument, the difficulty in which the appellee will find himself situated, in obtaining a re-imbursement of the freight from his consignees, if compelled to pay it, has been much insisted on. We think, that in the present action, it is not our duty, and therefore we ought not to enquire into claims that may be made, or rights or obligations which may exist, between him and other persons who are not parties to this suit.

It is, therefore, ordered, that the judgment, heretofore given in this cause, shall remain firm and valid in all respects, as if no re-hearing had been granted.

MISOTIERE'S SYNDICS vs. *COIGNARD.*

Fraud is presumed in a bankrupt.

Mathews, J. delivered the opinion of the Court. The appellees brought their action in the Parish and City Court of New-Orleans to recover a certain lot of ground, with its buildings and appurtenances mentioned in their petition, in the possession of the appellant, by virtue of a sale and de-

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livery from Misotiere, who failed and took the benefit of the Insolvent Laws, three days after the execution of an act of sale of the property, made before a Notary Public, and about six months after one said to have been executed under private signature. They contend that these acts of sale are void, as having been made without legal consideration and with a view to defraud the just creditors of Misotiere, whom they represent. According to the rules of law, providing for the sale of immoveable property and slaves, no act under private signature is good against third persons, unless recorded as therein required. Had the appellant rested his title on the private sale alone, it would have become necessary to examine how far creditors of an insolvent debtor are to be considered as third persons, in relation to the principles of law which govern contracts for real property. But he seems to have abandoned any pretention of right under the private act, by having subsequently accepted the title given him by the notarial instrument; and by this alone his rights must be decided. It is clothed with all the formalities required by law, and is certainly good and valid unless it can be shewn to be null and void, on account of fraud in the transaction. The decision of this case will turn very much on the principles laid down in the case of *Brown* vs. *Kennet & al. ante* 270.

The only distinction between them is that in the latter, a privilege claimed by Brown on a mortgage, made a short time previous to Phillips's bankruptcy was opposed by the syndics of his creditors, whereas in the suit now under discussion, the appellees claim restitution of property sold and delivered on account of fraud in the sale, and injury to the rightful creditors of the insolvent, Misotiere. In the course of the argument it was contended by the counsel for the appellant, that the verdict of the jury, is special and finds facts, in favour of the appellant, which ought to conclude this Court. We are of opinion that it must be viewed as a general verdict, finding both the law and the facts and that the correctness of the judgment rendered by the Court below is here to be tested by the rules of law.

In the case of *Brown* vs. *Kenner & al. ante* 270, after full argument of counsel and much deliberation of the Court, it was decided that a debtor, about to fail and who is unable to pay all his debts, cannot under such circumstances legally do any act, which in its effects will alter the situation of his creditors as it respects the privilege of the claims on his estate. The situation of the parties now before us, requires us to determine whether or not a debtor who is unable to pay all his just debts, can, at the very time he is about to fail and take the benefit of the laws made for insolvents, in any way dispose of his property to the injury, and

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in fraud of his creditors. In examining this subject the insolvent must be considered as a bankrupt, at the time he executed the sale of the lot to his brother the appellant: for according to the law respecting failures, as laid down in the *Curia Philipica*, "those persons, who are unable to pay all their debts entirely," are bankrupts.—Now, it is evident that Misotiere was not able to pay his debts at the time, when he made the transfer of the property in dispute, because three days after he surrendered all his property for the benefit of his creditors. Considered then as a bankrupt, fraud is to be presumed in all his acts, whereby he undertakes to divest himself of his property and put it out of the reach of his creditors, even in the payment of a just debt, to their prejudice, (same authority *Cha.* 9, *Fallidos*) unless it is made in the usual course of business. If it is right to presume fraud in the sale from Misotiere to his brother (and under all the circumstances attending it, we are of opinion that this must be presumed) it then becomes the duty of the appellant to rebut this presumption by shewing it to be a fair and *bona fide* transaction; as having paid for it a just and full price; this has not been done, the only consideration, proven in support of the sale, is a debt due from the bankrupt to him, which the law will not allow to be thus paid to the injury of other creditors. The act of sale is an instrument executed "*en tiempo inabil*," as having been done

at the very period of Misotiere's bankruptcy.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed with costs.

CLAIBORNE vs. *DEBON & AL.*

A *bond* given by an Auctioneer, instead of a *recognizance*, is valid.

Mathews, J. delivered the opinion of the Court. This cause comes up on a bill of exceptions, taken to the opinion of the Judge of the first district, before whom it was tried, in which he refused to allow the plaintiff to give in evidence to the jury, the bond on which the action is founded; because it was not taken in conformity with an act of the Legislative Council of the late Territory of Orleans, entitled "An Act to regulate sales at auction," although acknowledged by the defendants to have been by them executed.

The 3d section of the act, requires that "an Auctioneer, before entering on the duties of his office, shall enter into a recognizance, to the government with two sufficient freeholders as sureties in the sum of seven thousand five hundred dollars each, conditioned for the faithful performance of his duty as Auctioneer, towards all persons who shall employ him as such, and also for the payment of duties on articles sold; and that he shall in all things conform himself to the directions of this

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act;" which recognizance was to have been taken by one of the Judges of the late Territory and by him retained until the appointment of a Treasurer.

THE facts which are important to the decision of the case, and appearing in the record, are the following. 1st. that one Morin was regularly appointed Auctioneer for the city. 2d. that the appellees voluntarily entered into a bond or obligation, whereby they bound themselves under the penalty of seven thousand five hundred dollars, as sureties for the Auctioneer, "conditioned that he shall, well and truly observe and discharge the duties of his office, according to law." And 3d. that this bond was taken by the Treasurer of the Territory and not by one of the Judges.

IT is clear, from the manner in which this instrument was executed, that it is not a recognizance, according to the definition of the English law, from whence the term is borrowed and therefore it becomes unnecessary to notice the distinctions, made in the course of argument, by the counsel for the appellees between bonds and recognizances. And here also we may dismiss all the reasoning on comparisons drawn between office bonds and individual obligations, and amongst the former, those given for ease and favor and such as are not; as the instrument under consideration is evidently not one given for ease and favor. It is

equally evident, by comparing this bond, with the stipulations and conditions, required by the 3d section of the act just quoted, that it was not taken conformably thereto: it was not taken by a judge; the condition differs from that required by the statute and, therefore, were it to rest solely on the statutory provisions, must be considered void. The counsel for the appellant does not insist on its validity, as supported by the statute; but claims the benefit of the obligation imposed by it on the sureties, as being good and valid according to the general principles of law. Leaving then the act of the Legislative Council out of view, it becomes the duty of the Court to decide, whether or not, the bond is good and valid according to the general laws of the state; and this, altho' the only question in the cause, is hardly discoverable by the pleadings. The defendants in the Court below filed separate answers: one of them denies any breach of the covenant; the other after denying every thing contained in the plaintiff's petition, concludes by a plea of prescription: not a word as to the validity of the bond; and it is only when it comes to be offered in evidence to the jury that they oppose it on the ground, of not having been taken in pursuance of the statute, and on this principle it was rejected by the Judge.

The arguments, offered by the counsel of the appellees, against the validity of the obligation,

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which have weighed most with the Court, are those drawn from the cases of the New-Jersey Constables, found in Pennington's reports; when it was determined, that bonds executed by them to the inhabitants of certain townships, were void because they did not pursue the provisions of a statute of that state, under color of which they were taken; but imposed severer conditions on the constables and their securities, than those required by the statute.

FROM the history of these cases, it appears that a Constable, according to the laws of that state, when elected by a township is bound to give security to the inhabitants for the faithful performance. In one of the cases cited, viz. that of *the inhabitants of Woolwich* vs. *Forest & al.* (wherein Judge Pennington seems to have differed from the rest of the court) by the tenor of his reasoning, he places the want of validity in the bond, more on the ground of the hard situation of the officer, under such circumstances (being a species of duress) than on the principle of its nullity, because it did not conform to the statute. In relation to the parties in the present suit, nothing of this hardship exists: the acceptance and exercise of the office of Auctioneer, by Morin, was entirely voluntary; the act of the appellees, in becoming his security was equally so; there is no stipulation or condition in the bond, harder than those required by the act of the Legislative Council; and, according to the

general principles of our laws, one person may bind himself under a penalty for another: for although no obligation is created by a promise, *pure de alio*, yet when in promising the act of another, one submits to pay a penalty or merely damages, in case of the inexecution of the promise, it is not to be doubted, that in this case, he did not understand *de alio tantum promittere*, but that he promised for himself, that he would procure the other to do or give the thing. Therefore Ulpian says: *si quis velit alienum factum promittere, pœnam vel quanti ea res est, potest promittere.* L 38 § 2 *ff. d. t. Pothier on Obligations, no.* 56. The appellees are clearly bound by their obligation thus voluntarily entered into, unless there is something illegal or contrary to good morals in the condition; which is not pretended by them. We are, therefore, of opinion that the bond is good and valid in law; as the act of the Legislative Council does not prohibit the taking a bond different from the one required by its provisions, or declare such to be void: and this opinion is fully supported by the decision in the case of *Morse* vs. *Hudson*, 5 *Mass. Term Reports*, 314.

It is contended by the counsel for the appellees, that there are not proper parties to the suit. On this point, the Judge below has given no opinion, and therefore it cannot be here examined. But, as we are of opinion that he erred, in considering

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the bond void, because it was not taken in conformity to the provisions of the statute and on that account withholding it from the jury, the cause must be remanded.

IT is, therefore, ordered, adjudged and decreed that this cause be sent back to the District Court from whence it came, to be there tried over: and that the Judge be instructed, to admit as evidence the bond on which the action is founded.

JOHNSON vs. *DUNCAN & AL.'S SYNDCS, ante* 520.

If notes be placed in a creditor's hands, to secure him, without a written agreement, or one not properly registered, he will not keep them, against the others.

MATHEWS, J. delivered the opinion of the Court.* In this suit the appellant, who was plaintiff in the Court below, claims the re-imbursement of half the sum of $ 3250 77, on account of money paid by him in discharge of certain Custom-House bonds, wherein he and Duncan and Jackson were securities for M'Master and Adams. Had this payment been made by Johnson, out of his own funds, without relation to any other circumstance, except the impossibility of being refunded by M'Master and Adams, the principals in the bonds, there could be no doubt of his right to recover the sum thus advanced by him for the benefit of his co-securities, as they, on the failure of the principals to pay, were evidenly bound for

*MARTIN, J. did not join in this opinion, having been of counsel in the cause.

the payment of one half the sum secured by the bonds. But from the statement of the facts in the case, it appears, that there existed a variety of commercial transactions between Johnson and M'Master and Adams, in which he always has been and still continues to be their creditor to a large amount. Thus situated, they placed in his hands property and credits, to secure the payment of the sums owing to him in his separate and individual capacity; and should there be any thing more, than sufficient to satisfy these claims, collected, it was to have been applied to the discharge of said Custom-House bonds. Between the period at which Johnson received these securities and the time when he was obliged to satisfy the judgment, obtained on the bonds in the District Court of the United States, on account of the want of property in the hands of M'Master & Adams, he collected considerable sums on said securities, (which were principally notes due to the house of M'Master & Adams) but not sufficiently to satisfy his own individual claims. It has not been contended that there is any thing fraudulent in the agreement between Johnson and M'Master & Adams, as it was not done with a view to bankruptcy; and, therefore, he had a right to impute all the money collected to the payment of his separate and individual credits with them; and as to these sums they cannot now be taken into consideration. Let us then see how Johnson stands in relation to the

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notes and securities yet uncollected, at the time of issuing the executions on the judgment, obtained on the Custom-House bonds, and which, M'Master & Adams had no property to satisfy.

They must be considered as a pledge or pawn in his hands, intended to secure the payment of the debts owing to him by M'Master and Adams, and also such sums as he should be obliged to advance for them, on account of endorsements or in any other manner. But this pledge is without privilege to the holder, against third persons, because the contract by which he possesses it, was not made in public form nor has the private agreement been duly registered in the office of a Notary Public at a time not suspicious, as required by law. *Civil Code*, 446. Now, as Johnson holds these securities without privilege, whatever money may be collected on them, after the period at which M'Master and Adams became unable to pay their debts, ought to be appropriated to the discharge of them, according to their privileges, and he, being subrogated to the claim of the United States which is one of the highest privilege, as having paid it out of his own funds, will be entitled to retain the first money obtained on the securities which he holds. But, Duncan and Jackson, or their syndics, were equally liable to the United States, for the payment of the Custom-House bonds, with the appellant, and, therefore, the one half of what he advanced ought to be considered as having been

paid for their benefit, and they should be compelled to refund it: which will give them the privilege of being reimbursed in an equal ratio with Johnson, out of the first money arising from the securities in his hands; and the Court would have no hesitation in rendering judgment according to this view of the case, except that we find in the record that one of these securities is a note of Duncan and Jackson for 2317 dollars, which is acknowledged by the statement of facts to be good, and consequently may fairly be considered as so much money in the hands of the appellant, which must be imputed to the payment of the debt on the Custom-House bonds, and is in truth so much paid or refunded by M'Master and Adams. This sum, deducted from $ 3250 77, will leave a balance paid by Johnson, as stated in his petition of $ 933 77, the one half of which the appellees ought to be compelled to refund, being paid for their benefit. According to this view of the subject, the judgment of the District Court must be reversed, not on account of any error in the principles therein laid down, but because it does not go sufficiently far in settling the dispute between the parties and because it directs the sale of the notes and securities still in the hands of the appellant, which, as urged by his counsel, we do not think the best mode of testing their value. It is, therefore, ordered, decreed and adjudged that the judgment rendered in this cause

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in the Court below, be reversed and annulled; and proceeding here to give such judgment as ought there to have been given, it is farther ordered, adjudged and decreed, and we do hereby order, adjudge and decree, that the appellant do recover from the appellees the sum of four hundred and sixty-six dollars, eighty-eight cents, and it is further ordered and decreed that he, the appellant, shall proceed in the collection of the notes and securities still remaining in his hands, and that whatever money he may recover, over and above the sum of $ 2317, which he will collect from the appellees on their note, and which he has a right to retain on account of advances made in payment of the aforesaid Custom-House bonds, shall be imputed to the payment of the balance due from M'Master and Adams on said bonds, being 933 dollars and 77 cents, which, after the payment and satisfaction of the judgment herein rendered, will be owing, in equal proportions to him the appellant and to the appellees, and that he shall account for it accordingly.

Mortgagor buying the premises, under a *fi' fa'* may retain part of his debt becoming afterwards payable, out of the purchase money.

FOWLER'S SYNDICS vs. *DUPASSAU.*

DUPASSAU in a former suit had obtained judgment against Fowler, for a balance of one of the instalments of the price of a plantation, which was taken in execution, sold and bought in by

Dupassau. The last instalment was not due at the time. The sale, under the execution was at one year's credit and Dupassau gave his bond to Fowler, for the balance of the purchase, after deducting his own judgment. At the expiration of the year, Fowler having failed, his syndics brought suit on the bond.

The defendant insisted on his right to deduct out of its amount, that of an instalment due him by Fowler, and which had in the meanwhile become payable, and for which the premises were mortgaged to him, by the original sale to Fowler. The District Court having permitted him to do so, the plaintiff appealed.

Derbigny, J. delivered the opinion of the Court*. The only question in this case is whether a sale of all the right, title and interest of the debtor in the property sold, is a sale of his interest in the thing, exclusive of the mortgages which may exist on it; or in other words, if the price of such a sale, or any balance remaining on it after satisfaction of the debt on which the execution is levied, is to be paid to the debtor, clear of any mortgage, which may incumber the property.

When the Sheriff puts up property for sale, he certainly sells it, as the owner would, subject to

*Martin, J. did not join in this opinion, having been of counsel in the cause.

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any incumbrance; but he sells for a fixed price the whole property. If that price is less than the amount of the incumbrances, the buyer is exposed to pay, besides the price, the balance which may be due to the mortgage creditors. But, a sale of a tract of land, for a sum of so much, can never be construed to mean a sale for that sum and the amount of the hypothecary debts besides. Such a sale cannot take place without express stipulations to that effect; and a public officer, executing a judicial sale, has no right to enter into conditions and stipulations. He must sell the property seized for a fixed sum, and not a fixed sum and something more.

HERE the officer has strictly pursued the directions of the law. The title which he has given is in the form prescribed. He has sold to the appellee the tract of land exposed for sale and has, in the words of the law, transferred to him all the right, title and interest of the debtor therein.

THE circumstance of the mortgage creditor having in this case bought the property himself, does not alter the nature of the contract. He has a right to retain the amount of his mortgage out of the price of the thing bought.

IT is, therefore, adjudged and decreed, that the Judgment of the District Court be affirmed.

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When the wife renounces the law of *Toro* it need not be shewn that the debt was contracted for her benefit.

Where she contracts jointly with her husband, the renunciation of her right, on the subject of the contract, is implied.

DERBIGNY, J. delivered the opinion of the Court*. In this case Celeste Delavillebeuve, the appellee, bound herself, jointly with her husband, Edward Forstall, to the payment of a debt, to secure which they mortgaged to the plaintiff and appellant certain slaves. On that mortgage, the appellant sued and obtained an order of seizure and sale. But the appellee resists his claim on two grounds: 1st. that her obligation has not been contracted in such a manner as to bind her; 2dly. that it has not destroyed the tacit mortgage which she had on her husband's property for the restitution of her dowry. She has accordingly instituted a suit to be separated of goods from her husband, and she now prays to be paid out of the proceeds of his property in preference to the appellant.

I. AGAINST the validity of the obligation by her entered into, the appellee alledges that although she has made a formal renunciation to the law of Toro, by which such obligations are declared void, unless it be proved that the debt has been converted to her benefit, yet, inasmuch as no such proof has been made, she is not bound. In support of this assertion, she quotes the authority of *Febrero*, who says that this proof is incumbent on the creditor, and that in defect of it he has seen it adjudged that the wife

*MARTIN, J. did not join in this opinion, having been of counsel in the cause.

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should receive her dowry, or at least one half of it.

IT is certain that, by the Spanish laws, the wife is inhibited from becoming security for her husband, and that when she binds herself *in solido* with him, her obligation is to be void, unless it is proved that the debt contracted has been converted to her benefit. Yet, it is admitted in practice that by renouncing, with certain solemnities, the laws which contain those provisions, she may nevertheless bind herself. As to the manner of making such renunciation, it appears to be a question settled by the Spanish authors that the renunciation must be special, and so made as to shew that the wife understood the provisions of the law and the nature and extent of her renunciation. It is also a point settled, in the Spanish practical books, that it is useless to mention in the renunciation any other law than the 61st of *Toro*, which is the 9*th tit.* 3*d. book* 5*th* of the *Recopilacion de Castilla*, as being the last enacted and the only one in force on this particular subject. The renunciation in this case is made according to these rules: and so far there is no difficulty. But, it is not so easy to reconcile the opinions of the authors as to the operation and consequences of such a renunciation. *Febrero* thinks that, after it has been made, it is yet necessary to prove that the debt was converted to the wife's benefit, before the obligation can be enforced against her. But should this doctrine be adopted, where is the use of the

renunciation? The 61st of *Toro* does not hinder the wife from contracting jointly with her husband; it does not say that such contract shall be void at all events. It recognises the validity of it, in case it should be proved that the debt contracted was converted to her benefit. Therefore, without any renunciation at all, the wife could contract, and the contract would be lawful, if this fact should be proved. The question now recurs: where is the use of the renunciation so much insisted on and so minutely defined in the practical books? We must either say that it is an idle and ridiculous ceremony, or admit that its object, on the part of the renouncing party, is to dispense with the proof required by law and to bind herself absolutely. That this is the only reasonable interpretation which may be given to the renunciation is so obvious, that we deem it unnecessary to dwell any longer on this question.

II. The other ground on which the appellee relies is that, although it should be recognised that her obligation is valid and her renunciation binding, yet inasmuch as she has not, in express words, renounced her tacit mortgage in favor of the appellant, that mortgage stands unimpaired.

This may be answered by asking: what has the appellee renounced? She had a lien on the property which she and her husband undertook to bind in favor of the appellant. Had it not been for

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that lien, there was no use for her joining her husband in the deed of mortgage. For the purpose then, and for the only purpose, of removing the obstacle which her rights threw in the way of the intended contract, she came forward and renounced the benefit of the law by which those rights were protected. And this, it is pretended, is not a renunciation of the rights themselves! We think, however, that a renunciation to the protection of a law, which secures a right, is a most express and a most solemn renunciation of that right. It may be further observed that this is not a case where a special renunciation of the mortgage is deemed necessary on the part of the wife. Such renunciation being only requisite, where the husband contracts singly, as in a sale which he alone has a right to make; for, as the wife does not there join her husband in the contract, the only way in which she can secure the purchaser is by renouncing her mortgage in his favor. It is for cases of this nature that the 58*th law*, *tit.* 18, *part.* 3, establishes the manner in which that renunciation of the wife shall be expressed. But in contracts, where she binds herself jointly with her husband, and assumes, in every respect, the same responsibility towards the other party, the renunciation of her own right, upon the thing which she undertakes to pledge or alienate, is certainly included; else the obligation itself would be nothing.

THE objection raised by the appellee as to the validity of the mortgage, which she undertook, under the authorisation of her husband, to give on some of the slaves, supposing them to be her particular property, while they were the property of the community, cannot avail her. It could at most have been listened to, if it had come from her husband in due time; and might perhaps have been a cause for setting aside the proceedings by seizure, as to those particular slaves, before a final judgment on the merits, and when the question here is: who is entitled to the proceeds of the property sold, we must say that the joint creditor of the appellee and her husband shall receive it, whether it was the property of one or the other.

IT is, therefore, adjudged and decreed that the judgment of the District Court be reversed, and that judgment be entered for the appellant, for the full amount of his demand with costs.

BOURCIER vs. *LANUSSE.*

A contract of marriage, entered into here, cannot provide that the rights of the parties shall be according to the custom of Paris.

DERBIGNY, J. delivered the opinion of the Court*. The appellant, jointly with her husband Casimir Bourcier, sold to Paul Lanusse, one of the appellees, some real estate and some slaves,

*MARTIN, J. did not join in this opinion, the case having been argued and submitted to the Court, with that of *Brognier* vs. *Forstall* in which he had been of counsel.

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which, with the exception of one slave, were the property of the community. Against this sale she prays to be relieved, alledging that the instrument of sale was made without the solemnities required by law, and that she was prevailed upon to sign it, without being apprised of its contents, nor of the nature of the renunciations therein purporting to have been made.

Altho' the wife sells common property, jointly with her husband, if she renounces a law not applicable to the case, she will not be bound.

ON the part of the appellees, it is contended, 1. that to the alienation of the property of the community the appellant's consent was not necessary, inasmuch as by the custom of Paris, to which they have made a submission in their marriage contract, the husband has a right to dispose alone of the common property, as he pleases. 2. That supposing the Spanish laws to be those which ought to govern the effects of the marriage contract in this case, those laws do not, in case of sale of the common property, require any consent on the part of the wife to make such sales binding on her; and finally that the renunciations which by the Spanish laws were deemed necessary to bind the wife in those contracts where she was permitted to appear, must have ceased to be requisite since the promulgation of the Civil Code of this state, which recognises, without any restriction, that married women may enter into obligations, jointly with their husbands.

I. THE first question to be decided is whether the

custom of Paris is the law which ought to govern the effects of this marriage contract, because the parties have chosen to submit to it. Had strangers made such a submission in a foreign country subject to that law, there would be no doubt that it would continue here to regulate the effects of their contract. This is a principle not only adopted by the law of nations, but recognized among us by positive statute. But the parties, being in this country, entered into a contract, and stipulated that this contract should be governed by foreign laws. Had they a right to make such a stipulation? We already had occasion to say in a former case, that no power is bound to give effect, within its own territory, to the laws of a foreign country; and that a foreign law has no other force than that which it derives from the consent of the government within the bonds of which it claims admission. According to this principle the general laws of the country must govern every case but those which are permitted to be regulated by other laws. Is this such a case? Is it to be found any where in our laws that a contract entered into in this state may, if the parties please, be governed by the laws of a foreign country? So far from allowing any such thing, our laws, as they stood when this marriage took place, contain express prohibitions to the contrary. In *Partidas 3d. tit.* 14, *law* 15, it is said: "If the laws or jurisprudence of an other "country, over which our authority does not

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"extend, should be appealed to, we order that in "our dominions they shall not be received as evi- "dence, except in disputes arising between indi- "viduals of such foreign country, *or contracts "made there.*"

OUR Civil Code has introduced some new dis- positions in this respect concerning marriage con- tracts; but they extend no further than permit- ting the parties to stipulate that their contract shall be regulated by the laws of any state or territory *in the union*..

WE, therefore, think that the custom of Paris is not the law which ought to regulate the effects of the marriage contract in this case; and we will proceed to examine whether according to the laws of the land the appellant ought to be relieved against the sale made by her jointly with her husband.

II. IN order to understand the nature of the obli- gation here entered into by the appellant, and how far it may be binding on her, it is necessary to draw a distinction between those contracts to which the wife may be a party principal jointly with her husband, and those where she makes her ap- pearance in the character of a third party, for the only purpose of expressing her consent.

BY the Spanish laws, independent of any change which is said to have been introduced in our Civil Code, the wife was inhibited from be- coming security for her husband and when she

bound herself *in solido* with him, her obligation was to be void, unless it was proved that the debt contracted had turned to her benefit. It was however admitted in practice that by renouncing the benefit of those laws, she could nevertheless bind herself. In cases of this kind, provided the renunciation was made with the requisite solemnities, so as to make it appear that she knew the nature and extent of it and understood the provisions of the law, she became a party principal to the contract and partook with her husband in the engagement resulting therefrom. On the contrary, where the contract was one of those which the husband alone could make, such as a sale of his property or of the property of the community, the wife, if consenting to the sale and willing to secure the purchaser against her claims, appeared in the character of a third party for the purpose of renouncing her right on the property sold.

SHOULD the contract in this case appear in either of these forms, there would be no difficulty in applying the law to it. But this contract presents stranger features; it purports to be a sale of the common property made jointly, by the husband and the wife, and contains at the same time a renunciation on the part of the wife to a law which is applicable to cases of obligations contracted by the wife *in solido* with her husband; or in other words, the appellant appears as a party seller in a sale which her husband alone had a right to

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make, and renounces the benefit of a law which has nothing to do with contracts of this kind.

How to apply the law to such a case is certainly no easy task. On the one hand we see, on the face of this contract, that the appellant had not that information which is absolutely requisite, that is to say, a clear idea of the nature of her rights and the extent of her renunciation; for she does what she had no right to do, and renounces a law, which is not made for such a case. But, on the other hand, ought not her voluntary concurrence in the sale amount at least to a consent? And will not her engagement to secure the purchaser against all incumbrances be considered as including a renunciation of her own rights? The equity of the case is certainly in favor of the purchaser: but in matters of this kind we think we are bound by strict law. In consideration of the sort of tutelage in which married women are living, and to guard them, as much as possible, against compulsion in the disposal of their property, the laws have established certain rules, without an observance of which their acts are not valid. In the particular case now before us, that of a sale of the common property by the husband, the character in which the wife may appear and the manner in which she is to act are described by positive law. She must say: that she well knows the right which she had on the property sold by her husband, that she renounces that right, whether she

had it for reason of dowry, donation *propter nuptias* or other cause, and that she transfers it to the purchaser; (see the above cited 58th *law*, *tit.* 18, *part.* 3.) Instead of this what has she done? She has assumed the character of a seller herself, and has renounced the benefit of a law which is foreign to this case. The first requisite for the validity of her obligation, to wit, her knowledge of her rights and of the nature of her renunciation is here evidently wanting: nay, her ignorance of them is stamped on the face of the obligation. No equitable construction can cure such a defect. The act, as to her, must be pronounced a nullity.

After the distinction which has been drawn, it is unnecessary to observe that the innovations said to be introduced by the Civil Code in matters of obligations, contracted jointly by husband and wife, should such innovations really have taken place, would not affect this case.

It is, therefore, adjudged and decreed that the judgment of the District Court be reversed, and that judgment be entered for the appellant for the amount of her marriage portion, to wit, four thousand dollars, and the slave named Laurette.

See *post*, *June Term*.

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FITZGERALD vs. PHILLIPS.

FITZGERALD vs. PHILLIPS.

Ceding debtor, without a discharge, is suable.

DERBIGNY, J. delivered the opinion of the Court*. This is a suit instituted against a debtor, who has made a regular abandonment of his property to his creditors, and had the proceedings on the failure duly approved, but who obtained no discharge. The demand is made in the general form by one of the creditors in his particular name and for his particular benefit; and in answer to it the defendant pleads his surrender, and further alleges that he has not since then acquired property more than sufficient to support himself.

THIS suit having been dismissed by the District Judge as improper, the only question raised here for the consideration of the Court is, whether an action of this kind can be maintained.

IT is a well known consequence of the cession of goods that for such debts as were contracted before it and the creditors of which were duly called, it for ever liberates the person of the debtor from imprisonment; but that, if he has obtained no discharge, his future property, save what is necessary for his support is liable for the payment of those debts.

THE only difficulty, therefore, is as to the manner in which the creditors may come at that property.

*MARTIN, J. did not join in this opinion, having been of counsel in the cause.

A doubt was suggested whether the syndics, who had the management of the property surrendered, could not under the same authorisation, proceed against the debtor to compel him to surrender again; but, upon consideration, we think that the functions of the syndics cease with the administration of the property entrusted to their care, and as soon as their account is rendered and approved.

Upon the nature of the remedy, which the creditors have against their debtor in a case of this kind, our Code is silent. It simply says, "that "after the cession, the debtor is still obliged to "*surrender* whatever property he may become "possessed of." The Partidas on this subject (*law* 3, *tit.* 15, *part.* 5,) are somewhat more explicit, "The debtor, who has made a cession "of his goods is not thereafter obliged to answer "any judicial demand which may be brought "against him by those to whom he is indebted; "unless he should have made such gains as to "be able to pay all his debts, or a part of them." The practice, however, in such a case seems to be left undetermined; at least it is not to be found in any of the books which we have consulted. But it is obvious that, with the exception of the arrest of the debtor, the same steps must be taken and the same remedy sought, as where a forced surrender takes place for the first time.

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IN *Febrero de Juicios, book* 3, *chap.* 3, *sec.* 2, *no.* 39; we see that one of the cases in which a surrender is forced is when one of the creditors has sued out an execution against the debtor, and the others appear in order to oppose it, praying that he may not be paid in preference to them.

THE appellant, therefore, had a right to bring the present suit. If the other creditors think it worth their while, they may have the execution stopped, and the property divided among all.

IT is, therefore, adjudged and decreed, that the Judgment of the District Court be reversed, and that this suit be remanded to be tried on its merits.

See *post, March Term* 1816.

HOPKINS vs. *PERETZ & AL.*

There cannot be a *Curator and Administrator* of an estate, where several of the heirs are present and of age.

MARTIN, J. delivered the opinion of the Court. The petition states the plaintiff to be the *legal curator and administrator* of the estate of Jo. Mollere, dec. that there was exposed to sale, on the 5th of February 1812, for and on account of the succession, a tract of land, situated in the Parish of West-Baton Rouge, on the right bank of the Mississippi, bounded by the land of Madam Watts below, containing 800 arpents. That the defendant Peretz, became the purchaser, for the sum of $ 2100, and bound himself, a principal with the other defendant as surety, *in solido*, for the

payment of the purchase money, in three annual instalments, that the first instalment is due and unpaid.

THE letters of curatorship and administration, and process verbal of adjudication are annexed.

IT does not appear from the letters, whether the defendant died testate or intestate, whether his heirs are present or absent, of age or minors: but it is stated, in the preamble, that an assembly of the family of Mollere has recommended the appointment of the plaintiff, as *curator and administrator*. He is accordingly appointed: but it is no said whether he be curator of the *vacant estate* or of some *absent heir or heirs*: the date is the 3d *of February* 1812.

THE process verbal, states the exposition to sale and adjudication of the premises to the defendant Peretz, on the terms of the petition, and that he as principal, and the other defendant as surety, bound themselves *in solido* to pay the price *to* and *for the use of the estate*. It is subscribed by the defendants, two witnesses, and the Parish Judge.

THE deposition of the Parish Judge, comes up with the record, but it does not appear by which party it was introduced. He deposes that, being *Parish Judge and Auctioneer ex-officio*, he

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exposed the premises to sale, and that *several of the heirs* were *present*.

THE answer denies all allegations and states in avoidance certain facts, none of which appear to have been established.

THE District Court gave judgment for the plaintiff, and the defendants appealed.

IT has been contended in this Court, on the part of the defendants, that the judgment must be reversed; for, it is said, there was no sale, no vendor appearing to have intervened; none being named in the process verbal or act of sale, and no determinate tract of land being sold: that, intended to have been the object of the sale, not being sufficiently described. Farther, if there was a sale, the defendants' counsel says, the plaintiff cannot recover till he has discharged the obligation resulting from the contract, on the part of the vendor, by delivering the thing sold. He relies on *Civil Code* 261, 345, *art.* 8 and 2, 1 *Pothier on Oblig. no.* 42, *Traité de Vente* 326.

IT is material to ascertain the capacity in which the officer (by whose intervention the sale was effected) acted.

HE was Parish Judge and *ex-officio* Auctioneer.

IF he acted as Parish Judge, for he well might if the case was that of a *vacant estate*, (*Civil Code* 174, *art.* 127) then his, being a *judicial* sale, the

process verbal of adjudication is the only title the defendant could receive, accompanied perhaps with the prior proceedings. Then, the Judge was the *vendor*, and there has been a complete sale, evidenced by the signatures of the vendor, vendee and witnesses, officially taken and lodged among the records of the Court. In similar cases, either during the French or Spanish government, no delivery of possession seems ever to have been formally given: the process verbal being considered of the same validity as a notarial act of sale with a clause of *constitut* or *desaisine*. Thus, must we decree the sale a complete one, unless the presumption of a delivery was repelled by evidence of the vendor's refusal to give it, or the vendee's inability to enter: for we see nothing in the allegation of the want of certainty in the thing sold. It is described as Mollere's tract of land, of 800 acres, in the Parish of West-Baton Rouge, on the right side of the river, immediately above the tract of Madam Watts.

If the officer acted as an *Auctioneer* only, then the sale is as yet but an inchoate one. The instrument he has drawn is only a memorandum preserving the evidence and the terms of sale, without naming the owner of the land, for we cannot consider this memorandum, which appears to be the one, which it was the duty of the Auctioneer (by the 12th section of the act of 1805, ch. 4,

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"immediately after the sale to deliver to the pur-
"chaser, of the sale and purchase, designating the
"*object* and *day*, so that such purchaser may
"cause the same to be recorded, according to law)"
as dispensing with the designation, if it can be held to dispense with the intervention, of the vendor: it being of the essence of all contracts that there should be certain and *determinate parties*, as much as it is of the contract of sale, that there should be a certain and *determinate* thing, the object of it. The vendor must appear and execute an act of sale; then surely, before such an act at least, no delivery of possession, even *nudâ voluntate*, can be presumed.'

FROM the record of the suit we are unable to conclude that the officer acted in his *judicial* capacity as a Parish Judge: for the case appears to be one, in which he could not legally act as such. He deposes himself, that several of the *heirs* were *present* at the sale, then the estate was not *vacant*. If some of the heirs were *absent*, a curator ought to have been appointed to them, who might have proceeded with the heirs *present*.

WHEN an officer has two capacities, he cannot be presumed to have acted in that in which his acts are illegal. We are therefore to conclude that he acted as *Auctioneer*: then the authority and consent of the persons employing him must be

shewn. Then his instrument or memorandum cannot be viewed as completing the sale.

BUT it does not appear, the plaintiff has not proved, that he has capacity to sue. He alledges himself to be the legal Curator and Administrator of the estate, but this must be made out by proof since the answer denies this allegation, with the others.

HE is not a party by name to the sale. If any thing be due to the estate, the *heirs* must receive it.

THE office of *Administrator* is unknown to our law. It appears some of the *heirs* at least are *present*, he cannot therefore be Curator to the *vacant* estate. He does not state himself to be Curator to any *absent* heirs, the existence of such heirs is not even suggested, it appears he was recommended by the assembly of family, as a proper person to be appointed *Curator and Administrator* to the estate. Judging in this case, from what most ordinarily happens, there were *minor* heirs and he was recommended as the person most proper to defend them. He ought then to have been appointed their tutor or guardian: then, if the minors were sole heirs, he might claim in their right, otherwise jointly with the heirs of age or the Curators of the absent ones. Then the record ought to state the names of the minors, that their right may

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be discussed. But nothing of this has been done, and the record, on the contrary, disproves the plaintiff's capacity to sue.

THE judgment of the District Court must be reversed with costs.

MAYOR AND ALDERMEN &c. vs. *CLARK.*

Vendor does not warrant against a *tortious* disturbance.

MARTIN, J. delivered the opinion of the Court. The plaintiffs caused several lots to be put to auction, instructing the vendue master to give notice that the purchaser of each lot, on which there was part of a ditch should be bound to fill it up with the earth on both sides within thirty days. The deed of sale guaranteed the right of taking this earth, but as on some of the lots there was not a sufficient quantity of earth for the purpose, and on others more, the surplus earth on the latter might be used for the benefit of the former.

THE ditch intersected two lots purchased by the defendant, and by a plan of the premises, making part of the statement of facts, there appears to be a surplus of earth on the lot, adjoining that of the defendants, purchased by Joseph Tricou.

BY one of the clauses of the deed of sale the defendant acknowledged himself in due possession, the same "having been delivered to him, at the

"moment of the adjudication, renouncing in this "respect to the benefit of the laws relating to de- "livery of possession, and the delay which they "grant to shew that it was not given, in the same "manner, as if such delay was expired."

WITHIN the thirty days, the defendant began to take earth from Tricou's lot, but was prevented by him. On this, he called on the Mayor, who after viewing the premises, advised an application to the City Council, who, he said, would compel Tricou to forbear preventing the defendant. The Council directed their surveyor to make the necessary operations, in order to ascertain whether there was any surplus earth on Tricou's lot.

NOTHING more appears to have been done, by the defendant or Council: but the perpetual rent, which was the consideration of the sale of the lots to the defendant, being unpaid, the present suit was instituted for the recovery of the sum in arrear.

THE defendant contends he was not bound to pay, as the plaintiffs have not compelled Tricou to suffer him to take earth on his lot. The Court below expressed an opinion, unfavourable to the plaintiffs' recovery on the ground that "they had not "been able to secure to the defendant, the means "of improving his lots, in conformity to the contract "of sale: it being a point of law, that the obliga-

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"tion of delivering the thing sold, includes the "accessories and dependencies, designated and "specified in the act of sale."

THERE was a verdict and judgment for the defendant, on which the plaintiffs appealed.

THE defendant having acknowledged in the deed of sale, that possession was delivered to him at the moment of the adjudication, and having renounced the laws, under which he might have availed himself of the want of a delivery of possession, must be stopped now from denying that the possession was delivered him, and while he does not qualify the possession which he acknowledges to have received, we must understand an *absolute* possession of every thing that was to be delivered. He cannot, therefore, justify his failure to comply with the obligations his contract imposes on him, on the ground that the plaintiffs have not complied with the principal obligation of the vendor, the delivery of the thing.

IT is true the faculty of taking earth from certain lots is guaranteed, and if he be disturbed therein the plaintiffs must protect him: but this protection is only against *lawful* disturbances, the vendor does not warrant against *tortious* disturbances. Tricou does not claim any right under the plaintiffs, at variance with that which they have guaranteed to the defendant. He purchased at the

same sale, and if he repels the defendant, it is on the ground that in his judgment there is no surplus earth on his lot.

Now, after complying with the original obligation of the contract of sale, by delivering the thing sold, the vendor is entitled to the price, and if any succeeding event gives rise to new obligations, the vendee may be entitled to damages *pro tanto*. In the present case, even this does not appear, the judgment of the Court below must be reversed and there must be judgment for the plaintiffs for the arrearages due, with interest from the date of the petition.

GRIEVE'S SYNDICS vs. *SAGORY.*

Parol evidence may be received that a person not named as payee, in a bill of exchange, furnished the value and is interested therein.

MARTIN, J. delivered the opinion of the Court. The defendant purchased from the plaintiffs' insolvent bills of exchange to the amount of $3000, at par, payable down; but, paying one third in cash was accommodated with some delay for the two remaining thirds, giving his two notes and including in the account of the last, twenty-four dollars for interest. The bills were drawn payable to his correspondent in the Northern, were protested for non-acceptance and non-payment, and returned to the defendant, endorsed by the original payee, to his order, *value in account*. Due notice was given of the dishonor of the bill, but after the bankruptcy of the insolvent.

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THE insolvent received payment of one of the notes, but the other was in his hands, untransferred and came to the possession of the plaintiffs, on their appointment as provisional syndics. The defendant, after notice of the dishonor of the bills, applied to the plaintiffs to have the remaining note returned, on the ground of the consideration for which it had been given having failed; and on their refusal instituted a suit therefor: this suit miscarried, it being holden that *provisional* syndics were not suable.

THE plaintiffs brought then the present suit, and the defendant resisted the payment, on the ground, on which he had demanded the return of his note. At the trial, he offered a witness to prove that he was interested in the purchase of the bills, but the Court would not permit him to be sworn, on the ground that no parol evidence could be received of that fact. Judgment was had against him and he appealed.

THE statement of facts shews that the defendant was placed on the insolvent's bilan, for the full amount of the bills and did receive two dividends thereon the first in June 1812, of 24 per cent. the other in April 1814, of 10 per cent. ratifying and confirming these two dividends.

THE defendant resists the plaintiffs' claim on the ground that the consideration, for which the note was given, has failed. It is clear that the note

being still in the hands of the original payee, or what is the same in those of his syndics, the consideration, for which it was given, may be enquired into, and if there appears to have been no consideration at all, an illegal one, or one which has failed, the defendant must be holden discharged from the payment of the note: And it is not denied that the note was given for the purchase of bills, which have since been dishonored, are still unpaid, and are now in the hands of the defendant. But the plaintiffs' counsel contends that, between the parties, the consideration has not failed.

The circumstance of the bills not being drawn payable to the defendant, is presented to the Court as *conclusive*, or at least *primâ facie*, evidence, that the defendant did not purchase the bills as *principal* or for his own account, but as the agent or factor of the persons he caused to be named therein as payees—that, having funds of these persons to purchase the bills, and having occasion for part of these funds for his own affairs, he prevailed on the plaintiffs' insolvent to be satisfied with the third of the amount of the bills and to take the defendants' notes for the balance; virtually borrowing from the insolvent, two thousand dollars, the two thirds of the amount of the bills: thereby effecting by two payments *brevi manû*, or rather by no actual payment all, the purchase of the bills and the loan. That the defendant has

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had the complete benefit of that loan, the bills having enabled him to dissolve his obligation to the payees, without any liability, on any event on his part, and if the plaintiffs are cast in this suit, he will make a clear profit of one thousand dollars. While, if the plaintiffs recover, he will sustain no loss in discharging the judgment of the Court.

PLACING the case on this footing, the Court is of opinion that the Judge below erred in rejecting the witness offered by the defendant. The bills are expressed *for value receved*, but from nothing that appears on the face of them, while the *payment* was thus admitted, could it be ascertained by whose hands the money was paid. This, therefore, was to be made out by testimony *dehors* the bills, in the same manner as if one of the real parties to the bill was described under the words *& Co.* parol evidence should be admitted to shew who was the anonymous partner.

THE Court is of opinion that the circumstance alluded to by the plaintiffs' counsel is neither *conclusive*, nor *primâ facie*, evidence that the defendant was not a principal, but a mere factor or agent in the purchase of the bills.

CIRCUMSTANCES which are *conclusive* or *primâ facie* evidence of a fact are only those which *exclusively* attend it. Now, the circumstance under consideration is one which it is believed very often

attends purchases of bills, on the purchaser's own account.

If I wish to remit 1000 dollars to my correspondent in Philadelphia, either to be employed on my own account, or to discharge a debt I owe him, and which I have no direction to remit in any particular manner, prudence will suggest the precaution, if I purchase a bill, to have it drawn payable to this correspondent and not to me. For I thus limit the possibility of a loss on my part to 1000 dollars, or whatever I may pay for the bill. While if it be drawn in my name, I will alike be liable to this risk, and in case my correspondent puts the bill afloat, I will in the event of his dishonor be again liable to pay the full amount with damages, and eventually interest, if I be unprepared to take the bill up, on its being presented. While it is considered that of all mercantile transactions, those relating to bills of exchange are those which require the most attention and precaution, the circumstance of having caused a bill to be drawn in the name of the person, in whose hands the money is finally intended to be placed, cannot be viewed as an evidence that the person remitting does not remit as *principal*, but acts as an *agent or factor*. It is not intended to deny that coupled with others, this circumstance might add to their weight and perhaps, at last, cause the

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scale to preponderate: but alone it is *the weak presumption, which moveth not at all.*

ON this ground, denying any weight to this circumstance, the plea of the defendant has its full force and must prevail.

IT is perhaps proper, incidentally to observe, though it is unnecessary to the determination of this cause, that even if it were admitted that the transaction is really, as the plaintiffs state it to have been, still it is far from being clear, that they ought to recover.

THE defendant, by the endorsement of the bills to him by the payees, has been subrogated to their right. Now, if the payees, being still the holders of the bills, had interfered and become parties to this suit, and demanded, on the case shewn by the plaintiffs, or instituted a suit, (making the present plaintiffs and defendants parties thereto) and prayed, that the plaintiffs should surrender the note to them and the defendant be decreed to pay the amount, or allow credit therefore, considering the transaction between the insolvent and these parties, in its true light, the purchase of bills for their account and the money due on the note as the consideration therefore, perhaps the claim could not have been resisted on the fictitious character given to the transaction, or supposition of a payment by one party and of his immediately re-

ceiving the money on a pretended loan. In such a case, there would perhaps be much force in the argument that these payments, said to be *brevi manû*, are *fictions*, which cannot be allowed to destroy the party's *real* right, on the *actual* transaction.

THE defendant is further said to be precluded from relief on his note, because he has set up a claim, been placed on the bilan and received dividends, as a creditor of the insolvent for the total amount of the bills; while he cannot be considered as entitled to relief, unless his claim as a creditor be reduced and extinguished *quoad* the amount of the note.

THIS renunciation is at most an *implied* one, which cannot stand with the express and forcible assertion of his insisting on its full rights, whatever they may be, first by his demand of the surrender of the note, his suit against the provisional syndics, which though informal and incorrect is nevertheless evidence, since it conveys notice, of the claim, and finally his plea in the present suit, equivalent to an actual suit, which he may be supposed of having failed to institute, on no other ground than of his having been anticipated by the plaintiffs. No fraud can be attributed to him, for in asserting his claim on the bills, he did not conceal that on the note, the admission of which must

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have dissolved *pro tanto* his claim on the bills. While the parties could not agree on the adjustment of their rights, it was fair in either to pursue his own to the utmost. There was then no fraud and the express assertion must destroy the *implied* renunciation: *expressum facit cessare tacitum.*

THE payment *received* by the defendant, however, diminishes his claim to relief *pro tanto.*

THE judgment of the Parish Court must be reversed, and the same judgment must be entered as that of this Court, to be discharged by the cancelling and depositing into the office of the clerk of the Court below, for the use of the plaintiffs, within ten days, one of the bills amounting to one thousand dollars and the amount of the two dividends received by the defendant thereon, with interest on each dividend from the receipt of it; but the defendant having resisted the plaintiffs' claim, without tendering, or offering to allow the dividend now decreed to be refunded; must pay costs.

ELLERY vs. *GOUVERNEUR & AL.*

The fees of counsel, appointed to an absent debtor, must be fixed by the Court.

DERBIGNY, J. delivered the opinion of the Court. In a suit by attachment brought by the appellees, the present defendants, against Dawson and Lewis, the appellant, the present plaintiff, was

appointed by the Court counsel for the absent defendants. To obtain a compensation for his services he instituted the present action, praying that he may be paid, out of the proceeds of the property attached.

THERE is no doubt that in cases of attachment, where the defendant is absent, the property attached must be answerable for the payment of all costs and expences which are necessarily incurred in the prosecution of the suit, and that the plaintiff is to receive only the nett proceeds of the property sold, after payment of such costs and expences. A compensation to the counsel of the absent defendant, for his services, is certainly part of these necessary expences, and ought to be paid him out of the proceeds of the property. But in order to be entitled to such payment, the compensation must have been fixed according to law, that is to say, in the same suit and by the Judge. *Aut. accord. lib.* 2, *tit.* 23, *art.* 2.

HERE the services, instead of being taxed by the Judge, are valued by the counsel himself, and agreed to by the attaching creditor who has no interest to dispute them ; and they are made the ground of a separate action, while they ought to have been included in the costs of the original suit. Such an action cannot be maintained.

IT is adjudged and decreed that the judgment of the District Court be affirmed with costs.

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BRAND vs. LIVAUDAIS & AL.

BRAND vs. LIVAUDAIS & AL.

When there is a written contract, a workman will be allowed to resort to it, although he had presented an account, claiming less than was stipulated.

MATHEWS, J. delivered the opinion of the Court. This suit was brought by Brand, the appellee, in the Court below to recover the amount due to him, on a contract made with the appellants, as members of the committee of administration for managing and overseeing the building of the Orleans play-house. This contract or agreement he prays to be considered as making a part of his petition, and also an account on which he claims a balance of $1000. The account is stated according to an admeasurement of the building, made at his instance, without any authorisation of the Court. After the commencement of the action he moved to have experts appointed, to measure the work; which was accordingly alone: and it is agreed that their report fixes the true extent of the walls of the house and all other work and labour done and performed by the appellee, under his agreement above mentioned. No difficulty could possibly arise in the decision of this cause, were it not for the confusion created by the appellee, in his petition; having founded his action, both on the contract and on his account thus stated; which differs in the estimation of the work from that laid down in the first article of the agreement. It appears from the facts in this case that the completion of the play-house, was arrested and stopped by accidents not within the control of either of the contracting parties; and that, if the con-

tract has been fully carried into effect, there is no blame imputable to Brand; and he is legally entitled to the benefit of all the stipulations it contains, so far as he has complied with the obligations created by it, on his part. By the 1st article (the only one on which any dispute has arisen) he binds himself to build the "walls of the house of country bricks, and to plaster them, wherever designated by Mr. Latour, and for every toise of thirty-six feet square French measure, and one and a half brick thick, he is to receive twenty-three dollars." Now, it is clear from this article that Brand is entitled to receive $23 per toise, for the walls contracted and plastered, in any manner designated by Latour; he would be entitled to no more should he have been required to plaster them entirely, and is equally entitled to this sum, if not required to plaster them in any part. But in his petition he put an account wherein he claims only $20 per toise for constructing the walls, and $3 for that part of them which he plastered; and the only question is whether the filing of this account deprives him of the benefit of his contract. To give it this effect, it must be considered as an explanation of an agreement which is doubtful, a new contract, or a relinquishment on the part of the appellee, under the old one. It cannot be considered as explanatory of that which is doubtful in the agreement; because the instrument is sufficiently explicit in itself; nor can it be viewed as a

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new contract; for there is no consent of parties to it: and we do not think, that it amounts to such a relinquishment as ought to conclude him; because he demands more in his petition, than is given by the judgment of the District Court. The demand being for more than the verdict and judgment, renders it unnecessary for us to enquire how far a plaintiff, according to the principles of the Civil law, is entitled to recover more than he prays for in his petition when he proves himself entitled to it. Upon the whole, we are of opinion, that this cause ought to be decided by the notarial contract of the parties; and that according to its stipulations, the appellee, has not recovered too much.

IT is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

DELANY vs. *TROUVÉ & AL.*

Whether the wife has a priviledge for a debt due her, before the marriage, by her husband?

DERBIGNY, J. delivered the opinion of the Court. The plaintiff and appellant, after having been several years the concubine of P. Trouvé, one of the appellees, married him. *Two days before the marriage*, he subscribed in her favor, before two witnesses, an acknowledgment by which he declares himself to be her debtor in a sum of $2304, for wages earned by her, as his servant during twelve years. For that sum, the appellant

claims a legal mortgage on her husband's property, and pretends that she ought to be paid, in preference to Thomas Durnford the other appellee, out of the proceeds of a house which Trouvé sold him with a right of redemption. The only proof of her services is the acknowledgment above mentioned, and the deposition of one of the subscribing witnesses, who says that Trouvé told him he had taken the appellant upon wages, so that the sole source of the evidence of this fact is P. Trouvé.

THIS in itself would be enough to caution the Court against too easy an admission of this claim, so far as it may affect the interest of third persons. But there are circumstances here, so flagrantly suspicious, that they stamp fraud and collusion on the face of this transaction, and defeat the claim of the appellant, independently of any other consideration.

THE appellant, when first seen by the witness in the house of Trouvé, was by him mistaken for his wife: he found, however, that she was his concubine. After twelve years of such life, during which she had several children, Trouvé, on the eve of marrying her, signs an acknowledgment that he owes her full wages for all that time: no deduction: not a dollar ever paid her on account during these twelve years, though Trouvé was a man of considerable property. In the mean time she used to dress very neatly. Can this be believed? The witness himself, on whose sole tes-

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timony the success of this action depends, did not venture, notwithstanding his evident partiality to the appellant, to go the whole length in support of her claim. He had indeed sworn at first that the paper, here relied on by the plaintiff, was made before her marriage; but on being cross-examined to that point, he does not dare to affirm the fact, but confesses that he cannot say whether it was signed before or after; such a deposition upon such a voucher must not be permitted to defeat the claim of a legitimate creditor.

THEREFORE, without examining here how far a woman, creditor of the man whom she afterwards marries, may be considered as having bro't the sum thus due to her, and whether for such a debt she is entitled to a mortgage on her husband's property, we say that in this case the proof of the existence of the debt does not deserve credit, so far as to affect the interest of third persons.

IT is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed with costs.